RECORD AND BRIEFS

APR 10 2017

Case No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the Kingdom of Saudi Arabia (the "Kingdom") is a foreign sovereign and an international ally of the United States.[1] It submits this brief to assist the Court in understanding the crucial importance of the inviolability (and attendant immunity from service of process) of embassies and other missions of foreign states to the United States. The Second Circuit's decision squarely violates international law principles codified in the Vienna Convention on Diplomatic Relations and companion treaties, decades of customary international law, and the United States government's own longstanding position as expressed in diplomatic communications and to courts around the world.

The Kingdom has a robust diplomatic presence in the United States through its embassy in Washington, consulates in New York, Houston and Los Angeles, and its United Nations mission in New York. As much as any foreign state, the Kingdom has a strong interest in preserving the inviolability of foreign missions, enforced in part by the prohibition against serving legal process at mission premises. That prohibition, rooted in international law, is reflected in U.S. domestic law through the Foreign Sovereign Immunities Act ("FSIA")

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received timely notice of *amici curiae*'s intention to file this brief, and letters of consent have been lodged with the Clerk of the Court, pursuant to Supreme Court Rules 37.2 and 37.5. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

provisions regulating how legal process may be served in actions against a foreign state. Strict adherence to these principles has a direct and recurring practical impact on the Kingdom, which (along with its agencies and instrumentalities) is often improperly served with legal process at its U.S. embassy, consulates, and U.N. mission. *See, e.g.*, Summons, *862 Second Ave. LLC v. 2 Dag Hammarskjold Plaza Condos.*, No. 1:16-cv-08551 (S.D.N.Y. Nov. 2, 2016), ECF No. 1 (service of summons and complaint attempted by delivery to receptionist at the Kingdom's Consulate General in New York). As the Kingdom does not have a standing special arrangement, and is not a party to any convention providing for service of process in U.S. legal matters, the Kingdom has a particular interest in ensuring that U.S. litigants adhere to the service method provided in the FSIA, 28 U.S.C. §1608(a)(3), which conforms to the mission-inviolability protections of the Vienna Convention.

Allowing service of process on any embassy or other mission, place, or person subject to inviolability would undermine the certainty that allows the Kingdom and other foreign sovereigns to ensure an organized and timely response to U.S. litigation. The Second Circuit's decision is especially problematic as it casts doubt on the inviolability of missions to the United Nations in New York. For these reasons, review by this Court is needed to provide clarity and guidance in this area.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* to correct the Second Circuit's aberrational holding, at odds with

decades of law and consistent practice under the Vienna Convention on Diplomatic Relations ("VCDR"), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608 (2017), that service of process on a foreign state can be made "via" its U.S. embassy. The VCDR prohibits such transgression on the inviolability of a foreign mission, and the FSIA in these circumstances authorizes service only on a sovereign state's minister for foreign affairs.

The inviolability of foreign missions under VCDR Article 22 codifies longstanding custom and practice and is a cornerstone of modern diplomacy. The United States, the Kingdom, and countries across the globe have long taken the position that, as a result of the inviolability of foreign missions, service of process cannot be made on an embassy. In fact, upon the urging of the State Department, Congress modified an earlier version of Section 1608 of the FSIA to eliminate provisions that would have allowed service via a foreign state's embassy.

Disregarding this history, the Second Circuit fashioned an artificial distinction between service "on" an embassy and service "via" an embassy—a holding that violates both the VCDR and the FSIA. Service "via" an embassy is nothing but a fig-leaf when, as in this case, the district court found that service was effective when the *embassy* received the package—not when it was received by the minister for foreign affairs. That holding allows American courts to commandeer a foreign sovereign's diplomatic pouch, a practice forbidden by Article 27 of the VCDR and international practice. The decision below also directs courts to

violate Section 1608's requirement that service be "addressed and dispatched" to the foreign minister.

The Second Circuit's decision contradicts the United States' longstanding position on service. The U.S. regularly refuses to acknowledge service by mail on its embassies and other international facilities, properly requiring that official notice of the case be submitted by diplomatic channels. This position is substantially undermined by the Second Circuit's decision.

Finally, the Second Circuit's decision raises practical difficulties. The plaintiff may never learn when service is complete as embassies will not state when the service of process has arrived at the office of the foreign minister. Embassies may also feel constrained to discard or reject all forms of legal correspondence, limiting the assistance they may receive from their own lawyers. The decision also creates a circuit split in an area of law for which it is important that the federal courts and government speak with one voice.

The Kingdom respectfully urges this Court to grant the writ of *certiorari*.[2]

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[2] The Kingdom has no knowledge of the underlying facts here and accordingly focuses on the isolated legal issue before the Court.

ARGUMENT

I. The Inviolability Of Embassies Is A Cornerstone of International Law.

A. The Inviolability Provisions of the VCDR Are Critical to Foreign Relations.

The Second Circuit's decision extinguishes a critical part of the inviolability ensured by the VCDR.[3] The VCDR is one of the most universally-accepted sources of international law, and it resulted from American-led effort to codify customary rules of diplomatic relations dating back to the sixteenth century. The practice of granting diplomatic immunity, of course, stretches back millennia. *See United States* v. *Enger*, 472 F. Supp. 490, 504 (D.N.J. 1978) ("The ancient Greeks, as the first to regularize diplomatic relations, included in their practice the exchange of ambassadors and concomitant personal inviolability.").

The centerpiece of the VCDR is its codification of diplomatic protection with the "categorical" and "strong" word for immunity: "inviolable." *767 Third Avenue Associates* v. *Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295, 298, 302 (2d Cir. 1993) ("[F]ederal courts must defer to the language of Article 22."). Inviolability is a necessary precondition to open discussions between nations and a key to diplomacy. As the

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[3] Similar protection against the inviolability of consulates is codified in the Vienna Convention on Consular Relations, art. 31, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

International Court of Justice explained (in a case initiated by the United States), "[t]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.* v. *Iran)*, 1979 I.C.J. 7, 19 (Dec. 15).

The inviolability provisions of Article 22 of the VCDR negate the prospect of service of process on an embassy. Instead, service can be accomplished by direct mail to the head of the ministry of foreign affairs of the foreign state under Section 1608(a)(3), unless the foreign state objects to such service (as does the United States). In that case, as the State Department provides, service via diplomatic channels may be accomplished under Section 1608(a)(4) by mailing the materials to the State Department. *See* U.S. State Department, Bureau of Consular Affairs, *How do I effect service on a foreign state or political subdivision?*, *at* https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process/foreign-sovereign-immunities-act.html (last visited April 10, 2017). The Department of State will ensure "transmission through diplomatic channels to the Ministry of Foreign Affairs of the state concerned." David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 208 (2005).

Early drafts of the VCDR contemplated specifying certain exceptions to inviolability, but

most were ultimately rejected to avoid creating exceptions that might later swallow the rule. *See* Rene Värk, *The Siege of the Estonian Embassy in Moscow: Protection of a Diplomatic Mission and Its Staff in the Receiving State*, XV JURIDICA INT'L 144,146 (2008). Indeed, records from the negotiation show that one delegate withdrew a proposed clarification regarding service once he was satisfied that "it was the unanimous interpretation of the Committee that no writ could be served, even by post, within the premises of a diplomatic mission." United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, March 2 – April 14, 1961, Vol. I: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole (1962), U.N. Doc. A.Conf.20/14, at 141.

This understanding that no writ could be served by mail on an embassy was also enacted directly into U.S. law through 28 U.S.C. § 1608(a)(3); *see Autotech Technologies LP* v. *Integral Research & Development Corp.*, 499 F.3d 737, 748-49 (7th Cir. 2007) (rejecting "service through an embassy" as violating both the VCDR and § 1608(a)(3)). In fact, ***Congress changed the nascent Foreign Sovereign Immunities Act "to exclude the possibility" of service by "mail to the head of mission" in response to the State Department's position on that issue.*** Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed. 2016) at 124-25; *see also* Arthur Rovine, *Contemporary Practice of the United States Relating to International Law*, 69 AM. J. INT'L L. 146, 146-47 (1975) (noting State Department position that VCDR signatories "would

have a basis for objection to the propriety of process served in this manner under Article 22"); H.R. Rep. No. 94-1487, at 11, 26 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6609, 6625 ("A second means of [service of process of] questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations .... **Service on an embassy by mail would be precluded under this bill.**") (emphasis added).

That Congress changed Section 1608 to *eliminate* service of process by mail on an embassy to satisfy the inviolability requirement of Article 22 shows that the Second Circuit went astray when interpreting Section 1608 to *allow* service by mail "via" the embassy.

B. The Second Circuit's Decision Violates Both U.S. Law and the VCDR.

This Court should grant review because the Second Circuit's decision creates a circuit split and stands in direct conflict with the text of the VCDR and 28 U.S.C. § 1608(a)(3).

1. As explained above, inviolability under the VCDR and Section 1608(a) means that foreign missions are absolutely immune from service of process on the sovereign. *Barot* v. *Embassy of the Republic of Zambia*, 785 F.3d 26, 27-30 (D.C. Cir. 2015) (agreeing with district court's rejection of "attempted service at the Embassy in Washington, D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, as the [Foreign Sovereign

Immunities] Act required"); *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965) (noting that "the Ambassador's diplomatic immunity would have been violated by any compulsory service of process"). The Second Circuit circumvented this by drawing an artificial distinction between service "on" an embassy and service "via" an embassy. But the facts of this case reveal any such distinction as meaningless. Both the plaintiffs and the district court in the underlying action treated the time of delivery to the embassy, not the time of delivery to the foreign minister's office, as the triggering event for service.

The summons in the underlying case was purportedly delivered to the Sudanese embassy in Washington, D.C. on November 17, 2010. *See* Pet. App. 132a-134a. Plaintiffs moved for entry of default sixty days later, and the district court then entered that default on January 19, 2011—just 63 days after the package allegedly arrived at the embassy. *See* Pet. App. 27a-28a. Section 1608(d) gives a foreign sovereign sixty days to answer—and neither the district court nor Plaintiffs believed that they needed to wait until the embassy even had a chance to send the summons to Sudan and deliver it to the office of the foreign minister. They interpreted the date of receipt from the *embassy* as the applicable proof to satisfy service under Section 1608(c)(2).

The fact that default was sought and received almost exactly 60 days after the package was purportedly delivered to the embassy demonstrates that the "transmittal" of the papers from the embassy to the foreign minister is irrelevant to service in the Second Circuit's eyes. In other words,

if the service is complete upon delivery to the embassy, rather than upon delivery to the foreign minister, then service is not "via" the embassy at all—but "on" the embassy. This result creates a direct split with the other Circuits that have considered the question.

2. The decision below also violates Article 27 of the VCDR by allowing domestic courts to commandeer another sovereign's diplomatic pouch for its own uses. The Second Circuit held that service through an embassy is preferable to the alternatives because "mail addressed to an embassy ... can be forwarded to the minister by diplomatic pouch," comparing diplomatic pouches to "DHL" and other "commercial carrier[s]," and suggesting that each should be equally accessible to an American litigant. Pet. App. 14a. The notion that an American court can dictate the contents of a diplomatic pouch for *mere convenience* of a litigant is repugnant to basic norms of international law.

In contrast to the Second Circuit's decision, Article 27 of the VCDR explicitly states that the "diplomatic bag ... may contain only diplomatic documents or articles intended for official use." *See also Yearbook of the International Law Commission 1958, Vol. II*, U.N. Doc. A/CN.4/SER.A/1958/Add.1 at 97 (emphasizing "the overriding importance which [the Commission] attaches to the observance of the principle of the inviolability of the diplomatic bag"). Litigation documents do not become "diplomatic documents" merely because they have been mailed to an embassy. Diplomatic missions of foreign states cannot be utilized by litigants who do not wish to respect the mission's inviolability or comply with

FSIA requirements and State Department protocols. This Court should accordingly accept review to clarify the interpretation of the FSIA and VCDR that have been cast into doubt by the Second Circuit.

3. The Second Circuit's decision also eliminates the statutory requirement that the clerk of court address and dispatch the documents to the foreign minister. 28 U.S.C. § 1608(a)(3) explicitly requires that service be "***addressed and dispatched*** by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned" (emphasis added). The Second Circuit would allow the court to address and dispatch the process to an embassy, not to the foreign minister—and using the *embassy's* address, not the *minister's* address. The embassy, not the court, would then be expected to ensure that service be "addressed and dispatched" to the head of the ministry of foreign affairs. Relying on the embassy to perform the statutory requirements in its place, a court following the Second Circuit's rule would violate Section 1608(a)(3) and place the United States in breach of its obligations under the VCDR.

4. Finally, the Second Circuit sought to minimize the impact of its ruling by suggesting that a foreign sovereign could reject service of process sent to an embassy, and it faulted Sudan for its failure to do so. This notion emerged as the court denied rehearing, but it imposes an obligation of absolute prescience on an embassy that must now guess what the contents are of each letter sent to it. If it guesses wrong, presumably it does so at its peril. Or perhaps it just rejects all correspondence, rendering it more of a challenge to communicate with the embassy. Even if

it simply rejected all legal communications, this could chill attorney-client discussions (if the person receiving the mail did not appreciate that the correspondence came from the sovereign's counsel). Regardless of how one envisions this working in practice, it places an intolerable burden on embassies and individuals working there, and it finds no mooring in the text of any statute or treaty. This Court should accept *certiorari* to reinforce basic principles of inviolability and uphold the underlying premise of the VCDR.

C. VCDR Signatories, Including The United States, Agree That Inviolability Forbids Service on a State Through an Embassy or Other Mission.

The United States has consistently taken the position in Saudi Arabia and around the world that no service of process on its embassies, bases, training camps, or other facility will be recognized as valid under the VCDR. Like other signatories of the VCDR, the United States insists that service can only be accomplished through diplomatic channels.

For example, a Jordanian national recently brought suit in Riyadh against his employer, the U.S. Military Training Mission in Saudi Arabia ("USMTM"). A summons was served on an employee at USMTM headquarters, but the U.S. embassy responded with the following diplomatic note:

> As the Government of the United States mentioned in Diplomatic Note No. 15-1294 dated August 2, 2015 and Diplomatic Note 15-1506 dated 25 August 2015, under international law,

> before summoning a foreign entity to attend before the courts or any judicial authority in the country in which it is located, official notice of the case must be submitted through diplomatic channels ...
>
> [G]iven that the Notice is an attempt to summon the Government of the United States of America, the Government of the United States of America hereby informs the Ministry of Foreign Affairs that the United States Military Training Mission cannot accept documents with respect to legal action against the Government of the United States of America...
>
> Based on the method of summoning that is in violation of the law, the Government of the United States of America is not a party to this case. Therefore, it will not attend the hearing scheduled for January 4, 2016. The Government of the United States of America will not recognize as valid any award that may be issued against the Government of the United States in this case.

U.S. Diplomatic Note No. 16-0010, dated December 31, 2015 (translated text). As explained in pages 25-26 of the Petition, the United States has consistently taken this position before U.S. and foreign courts.

The Kingdom agrees with the position of the United States, as do most nations. *See* Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed. 2016) at 124 ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); *see, e.g.*, Statement of the Canadian Department of Foreign Affairs,

Trade and Development, *Service of Originating Documents in Judicial and Administrative Proceedings Against the Government of Canada in other States*, Circular Note No. JLA-1446 (Mar. 28, 2014), *available at* www.international.gc.ca/protocol-protocole/policies-politiques/circular-note_note-circulaire_jla-1446.aspx?lang=eng: ("**Service on a diplomatic mission or consular post is therefore invalid, however accomplished** ...") (emphasis in original). The United States risks negative reciprocal action by numerous other foreign states unless this Court intervenes.

D. The Second Circuit's Decision Will Lead To Confusion, Conflict, and Delay.

The Second Circuit's decision also poses practical difficulties. The rule forbidding service on an embassy has roots in historical practice and pragmatism. Simple and direct rules are critical to avoid confusion given the multitude of court systems around the world and to avoid the collision of legal cultures.

Some of the real problems and questions raised by the Second Circuit's decision include when service is complete. Under the Second Circuit's rule, service should not complete until the documents physically arrive at the foreign minister's address (although, as noted above, this rule is contradicted by the court's actual holding). But it is unlikely that the plaintiff or the court could ever learn this date, and thus no one may know when service is complete (perhaps the document sits for days or weeks in the embassy). This will unnecessarily complicate deadlines for a

response and involve problems of proof of receipt. And it will ensure a multitude of disputes over the effective date of service.

Similarly, "service via embassy" would not be reliable as a practical matter. Depending on individual practice, many embassies might simply discard or reject any purportedly "legal" mail as misaddressed. This certainly appears to be the position of the United States. *See, e.g.*, U.S. Diplomatic Note No. 16-0010, dated December 31, 2015. Workers in an embassy mailroom will not know which packages to accept, and may be instructed to reject any package mailed by a lawyer or a court to avoid unintentionally accepting service of process. This would lead to a chilling of important communications between embassies, their own counsel, and lawyers for U.S. foreign nationals.

The Second Circuit's rule also reveals an impossible line drawing problem. If service on (or "via") an embassy is valid, would service on a military or training base, presence post, or delegation suffice? If the ability to transmit documents securely is the key, the United States has thousands of entities that might be forced to dispatch service documents worldwide. Confusion will reign supreme.

That confusion is punctuated by the split between the circuits manifested by the Second Circuit's decision. Having different regional U.S. courts apply fundamentally inconsistent rules for service on foreign embassies will create confusion, lead to misunderstandings, and encourage forum-shopping. *See Barot*, 785 F.3d at 27-30 (rejecting service that

was attempted at an embassy, "rather than at the Ministry of Foreign Affairs in Lusaka, Zambia"); *Magness* v. *Russian Fed.*, 247 F.3d 609, 613 (5th Cir. 2001) (requiring service on the head of Russia's foreign ministry); *Autotech Technologies*, 499 F.3d at 748-49 (rejecting "service through an embassy" as violating both the VCDR and Section 1608(a)(3)).

This Court should resolve this circuit split. Foreign governments rely on the United States federal courts to speak with one voice when it comes to international affairs that affect their interests. *Vimar Seguros Y Reaseguros* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.").

And because Second Circuit law helps determine the inviolability of U.N. missions and the U.N. itself, the present decision is especially disconcerting. Until recently, the Second Circuit agreed with other circuits that "the inviolability principle precludes service of process on a diplomat as agent of a foreign government." *Tachiona* v. *United States*, 386 F.3d 205, 222 (2d Cir. 2004). The circuit's abrupt change of course concerns the Kingdom and all other nations with United Nations missions.

Reflecting VCDR principles, U.N. missions enjoy "immunity from legal process of every kind." Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, at art. IV, § 11; *see also* Agreement

Between the United Nations and the United States Regarding the Headquarters of the United Nations ("Headquarters Agreement"), June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11, at art. III § 9 (the U.N. "headquarters district shall be inviolable"). Indeed, the United States recently submitted a Statement of Interest that service of process on several foreign states' U.N. missions (as well as the Kingdom's Consulate General in New York) "would violate the United States' obligations" under the VCDR and the Headquarters Agreement. Statement of Interest of the United States at 4, *862 Second Ave. LLC v. 2 Dag Hammarskjold Plaza Condos.*, No. 1:16-cv-08551 (S.D.N.Y. Feb. 17, 2017), ECF No. 76; *see also* Statement of Interest of the United States at 8-9, *Georges v. United Nations*, No. 1:13-cv-07146 (S.D.N.Y. Mar. 7, 2014), ECF No. 21 (asserting that "plaintiffs' attempts to serve the UN ... were ineffective"). In other words, the Second Circuit's interpretation of diplomatic "inviolability" as not forbidding service of process on missions threatens settled law as relied upon by many nations.

The inviolability of foreign missions cannot be diluted by receiving states and their citizens, whether for security or convenience, and the United States has a long history of remaining steadfast to preserve those ancient privileges for ambassadors and embassies. This Court should accept *certiorari* to ensure that the Second Circuit's decision does not strip an important part of the inviolability protections under the VCDR. If the United States allows service of process by mailings to embassies, that practice will inevitably have reciprocal consequences outside the United States, potentially

unraveling the VCDR. The Kingdom respectfully requests that this Court uphold the inviolability of embassies from service of process under the VCDR and 28 U.S.C. § 1608(a)(3).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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